CHU BOON YEH & ANOR v. KERAJAAN MALAYSIA

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN MOHD GHAZALI JC
[CIVIL APPEAL NO: 11A-1-09-2014]
14 MAY 2015

CUSTOMS AND EXCISE: *Export – Taxable goods – Failure to deliver return form within taxable period – Discovery of shortfall of sales tax revenue – Allegation that sale of relevant goods to another business entity said to be part of arrangement for goods to be on-sold to third party exporter – Whether sales for local market – Whether links between appellants and third party existed – Whether allegations proved – Whether sale of goods in question should not be taxed – Sales Tax Act 1972, ss. 6, 19(1)*

The appellants were involved in the business of, *inter alia*, manufacturing metal goods, which were taxable goods under the Sales Tax Act 1972 ('the Act'). Section 19(1) of the Act requires the appellants, being a taxable person, to deliver to the respondent a return in Form CJP1/CJ No 3, setting forth the aggregate amount of the sale value of all taxable goods sold by the appellants, including the amount of sales tax payable on those goods, within 28 days after the end of each taxable period. Following an inspection of the appellants' books and accounts, the respondent claimed against the appellants at the Magistrates Court for a shortfall of sales tax revenue of RM77,326.99 together with an accrued penalty of RM38,663.49, resulting in a total claim of RM115,990.48. However, the appellant made nine payments and the outstanding and unpaid sales tax had been reduced to RM57,676.99, not including the accrued penalty of RM38,663.49. In questioning the legality of the respondent's claim, the appellants submitted that the sale by the appellants of the relevant goods to another business entity, YLS Metal & Machinery Works ('YLS Metal') were said to be part of the arrangement for the goods to be on-sold by the latter to CEE Industries Sdn Bhd ('CEE') who in turn exported the same. Thus, the sales were not for the local market and ought not to have been a taxable good subjected to the Act. The Magistrate held that the respondent had proven its case that the relevant sales by the appellants to YLS were to a local company, for the domestic market and it could not be proven by the appellants that the goods sold by YLS to CEE were the same as those sold by the appellants to YLS. The Magistrate further found, *inter alia*, that there was no delivery order from the appellants to CEE and payment for the purchase by YLS was made by YLS to the appellants and payment for the sale to CEE was undertaken by CEE in favour of YLS. There was no link between the appellants and CEE. Hence, the present appeal. The core contention of the appellant in the present appeal was that the items manufactured by the appellants were goods in the form of raw materials sold by the appellants to CEE through YLS and subsequently manufactured by CEE into finished goods for exports.

Held (dismissing appeal):

(1) Although the intention may well be not to impose sales tax on goods for exports, the scheme of the Act requires that specific approvals on exemptions be first obtained because there is no automatic non-chargeability of goods for exports based on a proper construction of the Act. As long as a case could be made out by the Royal Malaysian Customs Department to charge tax in accordance with the wordings embodied in s. 6(a) or (b) of the Act, sales tax would therefore be payable unless the taxable person could establish that the sale of the goods in question should not be so taxed by securing the requisite approval or establishing his situation to be within the relevant exemption and for that purpose, follow the process and procedure in accordance with the applicable provisions of the Act and the regulations made thereunder. (para 21)

(2) The assertions of the appellants that the goods delivered by them were for exports were bare statements without supporting evidence. The appellant's failure to present the requisite evidence and their inability to contradict the respondent's evidence did very little to advance the case of the appellants. In addition to that, not only do the various invoices and Form K2 failed to demonstrate the requisite connection, the very documents themselves were in any event inadmissible under the law because they were merely marked as 'ID' and never got converted and admitted as court exhibits. (paras 30, 31 & 34)

(3) There was no connection between the appellants and CEE during the material period that could be established by documentary evidence. The argument of the appellants that YLS were acting as an agent for the appellants in making the supplies to CEE similarly could not be accepted. No documentary evidence on the relationship between the entities was introduced during trial, and secondly, even if it had been, its value would have been negligible at best in light of the finding that the appellants could not demonstrate that the goods delivered by the appellants to YLS were finally exported. (para 38)

Case(s) referred to:

Badan Peguam Malaysia v. Louis Edward Van Buerle [2005] 4 CLJ 469 CA ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Government of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Joseph Thambirajah v. Bank Buruh (M) Bhd [2008] 2 MLJ 773 ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Lim Kong v. PP [1962] 1 LNS 89 HC ***(refd)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC ***(refd)***

Maxis Communications Bhd v. Director General of Inland Revenue & Anor [2014] 9 CLJ 899 FC ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
Palm Oil Research & Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor [2011] 5 CLJ 159 CA ***(refd)***
Ruslan Baharin Industries Sdn Bhd & Ors v. Kerajaan Malaysia [2010] 7 CLJ 713 CA ***(refd)***
Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor [1997] 2 CLJ 548 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 57(1)(a), (2), 102, 103
Income Tax Act 1967, s. 4
Interpretation Acts 1948 and 1967, s. 17A
Partnership Act 1961, s. 11
Sales Tax Act 1972, ss. 2A, 2B, 6(a), (b), 8, 9(1), (4), 10, 19(1), 22(2), 23, 26, 29, 30(1)(a)
Sales Tax Regulations 1972, reg. 18

For the appellant - Krishnan Nair; M/s Krishnan Nair & Co
For the respondent - Anis Wahidah Mohamad; FC

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Mohd Ghazali JC:

Introduction

[1] This is an appeal filed by the appellants against the entire decision of the learned Magistrate given on 21 August 2014, who had ruled in favour of the respondent, the Government of Malaysia (for Jabatan Kastam DiRaja Malaysia/the Royal Malaysian Customs Department) in the latter's action against the former for unpaid tax and accrued penalty under the Sales Tax Act 1972 (or "the Act").

[2] I have evaluated and considered the notice of appeal, the memorandum of appeal, the additional memorandum of appeal, the appeal records, the written submissions of the appellants and the respondent filed earlier (together with the accompanying respective bundles of authorities) as well as the oral submissions by counsels of both parties made before me on 23 April 2015.

[3] I agreed with the decision of the learned Magistrate and dismissed the appeal. This is my judgment dated 14 May 2015 which I delivered to the parties on even date.

A **Background**

[4] The appellants is a partnership registered under the Business Registration Act 1956 involved in undertaking all kinds of aluminium and glass works, interior and exterior renovation, as well as the supply of aluminium and glass. The manufacturing activity of the appellants, which
B involves metal based products brings the appellants under the purview of the Sales Tax Act 1972 for the carrying on the manufacturing of a type of taxable goods under the said Act. The appellants is thus a taxable person and have accordingly been duly licensed under the Act.

C **[5]** Section 19(1) of the Act requires the appellants, being a taxable person, to deliver to the respondent a return in a prescribed form (Borang CJP1/CJ No 3) setting forth the aggregate amount of the sale value of all taxable goods sold by the appellants, including the amount of sales tax payable on those goods, within 28 days after the end of each taxable period (two calendar months).

D **[6]** It would not be remiss of me to provide a brief background information about Sales Tax Act 1972, and I will not attempt to do any better than reproduce the succinct introduction made by Suriyadi Halim Omar JCA (as His Lordship then was) in the case of *Ruslan Baharin Industries Sdn Bhd & Ors v. Kerajaan Malaysia* [2010] 7 CLJ 713, as follows:

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> ... it is necessary that we briefly discuss the Sales Tax Act 1972 (the Act). Sales tax, introduced by this Act on 29 February 1972, with a single stage taxation in mind, for goods imported into the Federation by any person for home consumption is taxable at points of entry unless exempted. The scope excludes free zones, licensed warehouses, licensed manufacturing
> F warehouses and joint development areas, Langkawi and Labuan (see s. 1(3), 2(A), 2(B), ss. 72-90 etc.). Sales tax, *inter alia* is also charged and levied on taxable goods manufactured in the Federation, though raw material or components used in the manufacture of those goods are free from sales tax. Apart from the delineated and territorial exclusions, the relevant Minister may exempt certain persons and manufacturing
> G operations from the licensing requirements, for example manufacturers with annual sales turnover of taxable goods not exceeding RM100,000. Such persons will be required to apply for a certificate of exemption.
>
> A licensed manufacturer has certain statutory duties and amongst them is his accountability, as he is duty bound to account for the sales tax
> H payable, by submitting sales tax return to the respondent. Any failure of submission of sales tax returns within a given period may even result in prosecution. If a licensed manufacturer is taxable, he will be subject to the full force of s. 6 of the Act, which lays down what is charged to sales tax whilst s. 22 relates to the incidence of tax. In the event the licensed manufacturer is unable to pay the full sum of the sales tax there are
> I provisions that allow installment payments ...

Nature Of Appellate Function

[7] In hearing this appeal, I am reminded of the true role and function of this court as established by case law authorities and have therefore proceeded approaching the same accordingly. In particular, I refer to the decision of the Court of Appeal in the case of *Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor* [2011] 5 CLJ 159 where it was stated as follows:

> It was obvious that the learned judge was fully aware of the principle that an appellate tribunal should be slow to interfere with the finding of fact of a trial judge, in this case the Sessions Court judge, more so as he had the advantage of hearing and observing the demeanour of the witnesses before arriving at his conclusion. This well established principle, which also has common sense written all over it, was clearly at the back of his mind as he had made mention of the case of *Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500 in his grounds of judgment (see also *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 1 LNS 195; *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178).
>
> Despite the inhibition laid down by the above case, the learned judge still set aside the award of future earnings. Why he did that was merely an affirmation that the abovementioned inhibition is not absolute. It is the duty of an appeal court, if satisfied or convinced that the trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion, to reverse the decision (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; *Rasidin bin Partorjo v. Frederick Kiai* [1976] 1 LNS 123). Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch 704 had occasion to say:
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> > Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appeal from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong.

The Plaintiff/Respondent's Claim

[8] Following an inspection performed by the respondent on the accounts and books of the appellants for the period between January 2008 and October 2010, the respondent had (after the notice of demand issued under the Sales Tax Act 1972 against the appellants on 11 April 2011 remained not fully settled) filed a writ action claiming against the appellants for a shortfall of sales tax revenue of RM77,326.99 together with an accrued penalty of RM38,663.49 resulting in a total claim of RM115,990.48, in respect of the taxable period of March/April 2008 until September/October 2010. The appellants had however, until the filing of the writ action, made nine (9) payments which amounted to RM19,650 to the respondent. This effectively

means that the outstanding and unpaid sales tax to the respondent as so contended by the respondent has now reduced to RM57,676.99, not including the accrued penalty of RM38,663.49.

The Defendants'/Appellants' Case

[9] The appellants in their defence and submission essentially questioned the legality of the claim for sales tax since the sale by the appellants of the relevant goods to another business entity, YLS Metal & Machinery Works ("YLS Metal") are said be part of the arrangement for the goods to be on-sold by the latter to CEE Industries Sdn Bhd ("CEE Industries") who in turn exported the same. Thus the sales were not for the local market and ought not therefore to have been a taxable good subject to the Sales Tax Act 1972.

Decision Of Magistrate

[10] The learned Magistrate in his decision held that the respondent had proven their case that the relevant sales by the appellants to YLS Metal were to a local company, for the domestic market and it could not be proven by the appellants that the goods sold by YLS Metal to CEE Industries were the same as those sold by the appellants to YLS Metal. The learned Magistrate further found, among others that there was no "delivery order" from the appellants to CEE Industries, payment for the purchase by YLS Metal was made by YLS Metal to the appellants and payment for the sale to CEE Industries was undertaken by CEE Industries in favour of YLS Metal. There was no link between the appellants and CEE Industries.

The Grounds Of Appeal And Submission By Appellants

[11] The appellants listed a total of 19 grounds of appeal in their memorandum of appeal and a further seven in their additional memorandum of appeal, making it an aggregate of 26 grounds of appeal to be evaluated. It has not escaped the attention of this court that a few of the grounds in the additional memorandum of appeal are directly lifted, word for word from the memorandum of appeal. However in my assessment, I find that all the grounds essentially relate to the core contention of the appellants that sales tax ought not to have been levied on the sales (which were subject to the claim by the respondent) for the reason that the items manufactured by the appellants were goods in the form of raw materials sold by the appellants to CEE Industries through YLS Metal (said to be the appellants' agent) and subsequently manufactured by CEE Industries into finished goods for exports.

Evaluation Of The Grounds Of Appeal

[12] I will now consider each of what I have assessed to be the key grounds of appeal. As I mentioned earlier all the grounds listed by the appellants relate to aspects (including particularly evidentiary in nature) which advanced the appellants' contention that sales tax ought not to have been charged on the goods which were the subject of the claim by the respondent.

(a) Under The Sales Tax Act 1972, Sales Tax Is Imposed On Goods For Local Consumption Only, Not For Exports

[13] Section 6 of the Sales Tax Act 1972 provides as follows:

> 6. Charge to tax
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> Subject to this Act, sales tax shall be charged and levied on all taxable goods:
>
> (a) manufactured in Malaysia, or acquired under the provisions of Section 9, by a taxable person and sold, used or disposed of by him, otherwise than by sale or disposal to a licensed manufacturer authorised by the Director General to acquire such goods without payment of tax;
>
> (b) imported into Malaysia by any person for home consumption.

The learned Magistrate held that the requirement on "home consumption" is only applicable to imported goods under s. 6 (b) and not relevant to goods manufactured locally. The appellants in their submission in this appeal admitted that "home consumption" is not stated under s. 6 (a) but argued, without offering authorities, that the intention of Parliament is for sales tax to be imposed, levied and charged on all goods for local consumption only.

[14] Although the appellant did not offer case law authority on point to advance their contention I note that the Federal Court in a recent decision in *Maxis Communications Bhd v. Director General of Inland Revenue & Anor* [2014] 9 CLJ 899; [2014] 6 MLJ 753 held that when words in Income Tax Act 1967 are not clear, the purposive approach to interpretation should be adopted. This follows an earlier Federal Court decision in the case of *Palm Oil Research & Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 which had ruled that s. 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation, which should apply to all statutes, including taxing statutes.

[15] However, it is equally well established that the purposive approach is only applicable when there are two possible contending interpretations, and not where the provision in question appears to the court to be capable of only one construction (see *Badan Peguam Malaysia v. Louis Edward Van Buerle* [2005] 4 CLJ 469; [2006] 1 MLJ 21).

[16] Having reviewed the legislative framework of the Sales Tax Act 1972, with particular focus on s. 6(a) and (b), I am not persuaded that s. 6 must in each and every case, be construed so as not to be applicable to goods for exports, *per se* and without more. Firstly, it is quite plain, based on a literal interpretation, that the words in Section (a) do not exclude goods for exports. Even s. 6(b), as noted by the learned Magistrate, links the concept of "home consumption" to goods imported into the country. Secondly, the Act itself contains elaborate provisions relating to the sales tax regime, including the

requisite key operational framework on chargeability to tax. These include having special provisions dealing with specific trade areas within the Malaysian jurisdiction such as in respect of Langkawi and Tioman (in Part XVIIA and Part XVII).

[17] More relevantly, ss. 2A and 2B of the Act provide that free zones (as defined in Free Zones Act 1990) and licensed manufacturing warehouses are deemed to be outside Malaysia. This would directly impact on the sales tax chargeability as s. 6(a) and (b) refer to "Malaysia" as a key element of the statutory provisions. Thus if the legislature had intended to clarify the sales tax position of goods for exports, appropriate provision could have been drafted in s. 6 of the Sales Tax Act 1972, but this was not done. However, this is not to say that sales tax is or should be chargeable for goods intended for exports. There may well be established justifications why it should not be but the Act cannot be construed as not being applicable to goods for exports. The crucial point is the Act instead embodies provisions as to how goods for exports should be dealt with. In essence, these provisions support the philosophy of non-chargeability but this is only the case upon adherence to the relevant stipulations of the Act. Therefore, if these stipulations, such as the need to obtain specific clearance or exemptions are not adhered to, the jurisdictional and statutory reach of the Sales Tax Act 1972 on the chargeability of tax would, by its clear words, extend to goods for exports. This is supported by s. 29 of the Act on Drawback which provides the following:

> Section 29. Drawback.
>
> Drawback of the full amount of sales tax paid in respect of goods which are subsequently exported from Malaysia may, subject to regulations made under this Act, be allowed.

[18] This provision (and reg. 18 on Drawback in Sales Tax Regulations 1972) to my mind suggests that in general, sales tax is not intended to be imposed on sales of items not meant for local consumption. Another pertinent example is the Sales Tax (Exemption) Order 2008 where under item 71 of Schedule B, all locally manufactured goods for exports purchased by any person approved by the Director General are exempted from sales tax.

[19] Therefore, whilst the intention may not be to charge tax for goods meant for exports, the scheme of the Sales Tax Act 1972 does not provide for its automatic non-applicability to exports. One may contend that its non-applicability to goods for export is implicit if not obvious such that specific words to that effect would be unnecessary. In my view however, the Sales Tax Act 1972 deals with this point differently, by not making it automatically excluded from ambit of the Act, but instead generally empowering the Minister charged with the responsibility for finance to exempt and refund (ss. 8 and 10), the Director General to approve materials

for manufacturer to be tax free (s. 9), in addition to the provision on drawback (s. 29) and the Sales Tax (Exemption) Order 2008 as mentioned above. There must therefore be some form of exercise of a legal authority for the granting of approval or exemption under the Act for certain taxable goods, including for exports, before it could be stated that no sales tax is chargeable. What this means is that if the argument of the appellants that export items are not subject to the Act was true, then these provisions having relevance to exports would be redundant and of no legislative utility.

[20] Indeed, several of the respondent's witnesses, all serving the Royal Malaysian Customs Department stated that sales tax would not be chargeable on goods for exports (testimonies of SP1, SP2, SP5, SP7, SP9, SP12). However, it was also made clear that the relevant exemptions must first be obtained.

[21] Accordingly, on this question, I hold that the decision of the learned Magistrate is not flawed and therefore ought not to be disturbed. Although the intention may well be not to impose sales tax on goods for exports, the scheme of the Sales Tax Act 1972 requires that specific approvals on exemptions be first obtained because there is no automatic non-chargeability of goods for exports based on a proper construction of the Act. In other words, for as long as a case could be made out by the Royal Malaysian Customs Department to charge tax in accordance with the wordings embodied in s. 6(a) or (b) of the Sales Tax Act 1972, sales tax would therefore be payable, unless the taxable person could thereafter establish that the sale of the goods in question should not be so taxed by securing the requisite approval or establishing his situation to be within the relevant exemption, and for that purpose follow the process and procedure in accordance with the applicable provisions of the Sales Tax Act 1972 and the regulations made thereunder.

[22] Having found that goods for exports are not automatically outside the scope of Sales Tax Act 1972, and that specific exemption must first be sought and obtained for this purpose, the fact that the goods sold to YLS Metal by the appellants (which were the subject of the claim by the respondent) did not have the benefit of any such exemption must thus mean that this appeal fails.

(b) Since The Goods Were For Exports, Failure To Seek An Exemption Which Was Administrative And Technical In Nature, Did Not Justify Imposition Of Sales Tax

[23] A key point of contention in the proceedings at the court below and raised in the submission by the appellants in this appeal is that the sales undertaken by the appellants, being a licensed manufacturer under the Act to YLS Metal, a non-licensed entity could have been exempted from sales tax (given that the latter subsequently sold the goods to CEE Industries, another licensed manufacturer) if approval had been obtained under s. 9(4) of the Act, which reads as follows:

A (4) Where a person who is not licensed acquires taxable goods from a licensed manufacturer on behalf of and for delivery to another licensed manufacturer, such person may acquire and deliver such goods as may be approved by the Director General free of sales tax provided such person is authorised by the Director General to acquire such goods from a licensed manufacturer on behalf of and for delivery to another licensed
B manufacturer free of sales tax, subject to such conditions as may be prescribed.

[24] The appellant argued that the failure to apply for the approval under s. 9(4) was a technical error and that the approval for exemption was in any event merely an administrative matter. As an administrative requirement,
C although action may be taken in the form of appropriate penalties in the absence of any exemption for the sale of the goods, there is no legal basis for sales tax to be charged for the goods in question, since these were meant for exports.

D **[25]** I do not agree with this argument which I view to be patently erroneous as well as potentially confusing. By no shred of imagination can it be said that the statutory provision of s. 9(4) of the Sales Tax Act 1972 to be merely "administrative". Even if this was meant in the sense that the decision to grant exemption by the Director General would be almost automatic, this does not in any way depreciate the status of the approval
E under s. 9(4) which is manifestly statutory in nature and effect. An application must be submitted in order to enable a specific decision on exemption be made. Indeed, s. 11 expressly provides that failure to comply with conditions imposed on any exemption granted under s. 9(4) would trigger the obligation to pay such sales tax which was earlier made tax free
F by virtue of the exemption. Clearly therefore, sales tax would be chargeable under s. 6 in the absence of any exemption pursuant to s. 9(4) or if any of the conditions attached to the exemption is not adhered to. The argument of the appellant that there is no legal basis to charge sales tax since the exemption if only administrative in nature is therefore plainly mistaken.

G *(c) Items Produced By The Appellants Were Raw Materials Supplied To CEE Industries (Through YLS Metal) For CEE Industries To Then Manufacture Into Finished Goods For Export, Which Should Therefore Not Be Subject To Sales Tax*

[26] This is the crucial part of the judgment. However the context of this issue *vis-à-vis* the preceding two questions should be made clear. It has been
H established in this judgment earlier that firstly, goods for exports are subject to the provisions of the Act. Secondly, there are provisions pertaining to exemptions which are of relevance to exports. Not abiding by these rules by not securing the relevant exemptions would mean that sales tax would therefore be chargeable on the goods for exports. Now, this third issue is
I where the exemptions are assumed to be in place for CEE Industries to export without being charged sales tax. It is contended that the sales in question (by the appellants to YLS Metal) were then on-sold to CEE

Industries for exports, and thus ought not to be taxed. It is critical that I set out in summarized fashion the arguments emphasised by the appellants in their memorandum of appeal, additional memorandum of appeal and submission (both written as well as orally presented), as follows:

(a) The sales of goods were undertaken by the appellants for CEE Industries. YLS Metal acted as the agent or intermediary for the appellants, making orders for the items from the appellants based on the requirements of CEE Industries;

(b) Sales invoices were thus issued by the appellants to YLS Metal and the latter in turn produced sales invoices on what the appellants contended to be the same goods to CEE Industries;

(c) Witnesses for the appellants (SD1), including from YLS Metal (SD3) and CEE Industries (SD2) all testified the goods in question were exported by CEE Industries;

(d) The relevant audit officer of Royal Malaysian Customs Department (SP5) who only examined the relevant documents pertaining to the taxable goods sold to YLS Metal (especially on invoices from the appellants to YLS Metal) and did not extend her examination to the subsequent leg of the flow of the goods as supplied by the latter to CEE Industries. SP5 also confirmed that no tax would be chargeable if the appellants sold the goods directly to CEE Industries and not directly through YLS Metal. In fact, at present, the arrangement has been adjusted where the sales are done by the appellants directly to CEE Industries, and the relevant invoices are issued directly to the latter. The applicable approvals/ exemptions have also been obtained and the goods are not subject to tax;

(e) The goods delivered by the appellants (through YLS Metal) to CEE Industries are exported as confirmed by the Export Declaration Forms (Borang K2) which data is within the IT system of the respondent and should therefore be within the full knowledge and control of the officers of the respondent; and

(f) The learned Magistrate should have taken judicial notice or judicial cognisance of items confirmed to have been approved by the respondent for exports, of the flow of the goods from appellants to CEE Industries, which were done without any abuse of facilities made available by the Government to encourage manufacturing of goods locally for the export market. The relevant sales and exports are duly documented and reconciled. There is also no allegation of loss of revenue to the Government, or goods unaccounted for, thus confirming that the items delivered by the appellants have indeed all been exported, and not disposed of domestically.

[27] I have earlier in the judgment already held that the appeal could not succeed because the taxable goods in so far as the transactions between the appellants and YLS Metal are concerned, did not enjoy the benefit of the relevant exemption under s. 9(4) (or for that matter, any other provision of the Act or its regulations) and that whilst the Sales Tax Act 1972 may have intended that sales tax ought not to be imposed on goods for exports, the scheme of the Act requires that the process of obtaining the requisite exemption or approval must first be followed. This the appellants failed to have done. Thus, even if the goods were indeed proven to be for exports, the relevant exemption must first be obtained for the goods to be considered as tax free.

[28] Nevertheless, I have considered the other arguments submitted by the appellants in this appeal in order to ensure all material issues raised are properly examined and thoroughly evaluated.

[29] The key argument of the appellants that the goods originally sold to YLS Metal were the same or substantially the same as subsequently delivered to CEE Industries for exports cannot succeed for the simple reason that it could not be proven, on balance of probabilities that the items sold by the appellants ended up being exported by CEE Industries (it is safe to assume for purpose of this judgment that exports by CEE Industries, a licensed manufacturer are properly authorised under the Act and that sales tax is not levied the same). There were no invoices issued by the appellants to CEE Industries nor were there any delivery orders. The invoices issued by the appellants to YLS Metal and the invoices by the latter to CEE Industries did not refer to the same items of product. During trial, when questioned in cross-examination, none of the witnesses for the appellants (SD1, SD2 and SD3) (appeal records – notes of evidence pp. 70, 83 and 94, respectively) could identify from the invoices issued by YLS Metal to CEE Industries and the Export Declaration Forms (Borang K2) (ID39, ID40, ID41, pp. 1-304 of the appeal records) the exact goods supplied by the former that were said to have been then exported by CEE Industries as the descriptions in the different documents (specifically, the invoices and Borang K2) are not the same. This is even though all three witnesses of the appellants (SD1, SD2 and SD3) had earlier positively testified that the goods from the appellants are for exports by CEE Industries.

[30] The onus is on the appellants to introduce sufficient evidence to prove that the goods delivered by them were for exports. The learned Magistrate found that the assertions of the appellants on this issue were bare statements without supporting evidence. I am inclined to agree.

Section 102 of the Evidence Act 1950 provides as follows:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[31] Thus, the failure by the appellants to present the requisite evidence to establish their case that the goods sold by them were exported, and therefore unable to contradict the evidence given by the respondent did little to advance the case of the appellants.

[32] In addition, s. 103 of Evidence Act 1950 provides as follows:

> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[33] It is therefore clear that the duty is on the party who alleges a fact to produce the necessary evidence in proof of it (see also *Juahir bin Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627). As such, similarly, it is for the appellants to prove that the goods they sold to YLS Metal were finally exported by CEE Industries. This, they have failed to do.

[34] Most critically, I should emphasise that not only do the various invoices and Borang K2 failed to demonstrate the requisite connection, the very documents themselves (specifically, the invoices and Borang K2) are in any event inadmissible under the law because as stated by the learned Magistrate, they were merely marked as "ID" and never got converted and admitted as court exhibits. I need only refer to one case law authority on this important point. In the case of *Joseph Thambirajah v. Bank Buruh (M) Bhd* [2008] 2 MLJ 773, the Court of Appeal, in declining to rely on a notice of demand which was only marked an ID, followed an earlier decision of the Court of Appeal in *Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor* [1997] 2 CLJ 548; [1997] 1 MLJ 690 where it was held as follows:

> During the course of the trial, various documentary exhibits were referred to by both sides and marked as exhibits to be identified (ID) since the admissibility of such documents were objected to by either side on the ground that the makers were not called. I rule that since these documents were not strictly proved as required by s. 73 (a) of the Evidence of Act 1950 thereby deprives the opportunity to test the authenticity of the their contents, such exhibits remain inadmissible.

[35] Similarly in this case, as the various invoices and Borang K2 are marked merely as "ID" and had never been converted to court exhibits, no reliance can be made on them as exhibits which shall thus remain inadmissible. In any event, even if these documents were evaluated (as I have done) as mentioned above, they would be of no assistance to the appellants.

[36] Furthermore, the contention that the officer who performed the examination on the documents of the appellants (SP5) should have expanded her task to include the subsequent sales to CEE Industries is also untenable. The respondent had undertaken the examination exercise that was founded on the principal statutory provision on chargeability to tax as embodied in

A s. 6 of the Sales Tax Act 1972. Their claim for unpaid tax and penalty was premised on the case developed against the appellants in respect of a factual situation which fell squarely within the wordings of the statutory provision of s. 6(a) which provides for sales tax to be paid for the sale by a taxable person of goods manufactured in Malaysia, which is not a sale to a licensed B manufacturer authorised by the Director General to be without payment of tax. It is for the appellants to have introduced evidence to show the goods were exported in accordance with s. 103 of the Evidence Act 1950.

[37] As I have ruled earlier in this judgment, goods for exports are not automatically outside the legislative framework of the Sales Tax Act 1972. C Even if it was assumed that the Act has no relevance and application to exports (which I disagree), the appellants have also similarly failed to introduce evidence to show that the very goods in question, which originally sold by the appellants, ended up being exported by CEE Industries.

[38] In addition, as correctly held by the learned Magistrate, the D respondent was not wrong to have established that the sales by the appellants to YLS Metal were to a local company and that the series of transactions between the appellants and YLS Metal were conducted in the country. There was no connection between appellants and CEE Industries during the material period that could be established by documentary evidence and the E argument of the appellants that YLS Metal were acting as an agent for the appellants in making the supplies to CEE Industries similarly could not be accepted. In the first place no documentary evidence on the relationship between the entities (for the purpose it was claimed) was introduced during trial and secondly even if it had been, its value would have been negligible F at best in light of the finding that the appellants could not demonstrate that the goods delivered by the appellants to YLS Metal were finally exported.

[39] The further contention by the appellants that all export-related data was within the IT system and documentation in the knowledge and control of the respondent is also lacking in substance. As I held earlier, ss. 102 and G 103 of the Evidence Act 1950 clearly put the onus on the appellants to introduce evidence to prove the goods were exported. Furthermore, based on what had been argued in the court at first instance and since no evidence had been led on how the relevant IT system works and their exact capabilities, it is difficult to speculate how the IT system maintained by Royal Malaysian H Customs Department could establish that any single item that has been exported by CEE Industries could be traced back to the specific goods first sold by the appellants to YLS Metal. This is especially given that some of the goods sold by the appellants are said to be raw materials, and thus must have undergone certain manufacturing transformative process before the final I product came into existence.

[40] In addition, nor does the point about the present business arrangement adopted by the appellants, where the goods would now be directly sold by the appellants to CEE Industries change the legal analysis. Even though all the witnesses for the appellants (SD1, SD2 and SD3) testified that the goods involved in the present arrangement were similar to the previous one, the critical issue is one of evidence and proof in respect of whether the goods sold during the material time were actually for exports. It could well be that under this new arrangement, the items described in the invoices from the appellants to CEE Industries could now be reconciled with the relevant Borang K in the absence of an intermediate transaction involving YLS Metal as had been the case previously. A more important distinguishing factor in my view is that the dealing between the appellants and CEE Industries, both licensed manufacturers under the Sales Tax Act 1972, could benefit from s. 9(1) of Act which permits the Director General to approve the goods to be sales tax free to the acquirer. It reads as follows:

> 9. Materials for manufacturers to be tax free.
>
> (1) Where any licensed manufacturer acquires taxable goods from another licensed manufacturer, such first mentioned manufacturer may acquire such goods as may be approved by the Director General free of sales tax provided such person is authorised by the Director General and subject to such conditions as may be prescribed, to acquire such goods free of sales tax.

[41] It is instructive to appreciate that this section, by its provision, (just like the provisions of s. 9(4), the exemption in respect of which the appellants should have obtained earlier) does not require that the taxable goods must be for exports before the approval can be granted. It is unfortunately not apparent from the decision of the learned Magistrate, the appeal records and the written submission of parties as to the nature and basis of the approval or exemption granted by Royal Malaysian Customs Department now said to be enjoyed by the appellants and CEE Industries in respect of the present business arrangement. This could also be granted under item 71 Schedule B of the Sales Tax (Exemption) Order 2008 which, as mentioned earlier in this judgment, was issued pursuant to s. 8 of the Sales Tax Act 1972. This section empowers the Minister to exempt classes of goods and persons from payment of sales tax. Item 71 states that all locally manufactured goods for exports are exempted from sales tax if purchased by any person approved by the Director General subject to amongst others, that the goods are purchased from a licensed manufacturer, the goods are exported within six months of purchase, and the requisite certificate is presented to the Royal Malaysian Customs Department. I venture to form the view that it is more appropriate for s.9(1) to be the basis for the present arrangement between the appellants and CEE Industries since this s. 9(1) clearly envisages a transaction between licensed manufacturers whilst item 71 of the Sales Tax (Exemption) Order

A 2008 stipulates that goods manufactured locally for exports may be exempted from sales tax if acquired from a licensed manufacturer by a person who must first be approved by the Director General. In any event, none of the relevant exemptions had been secured by the appellants during the relevant taxable period.

B **[42]** Further, I do not see how the contention about the court taking judicial notice of goods approved for exports by the Royal Malaysian Customs Department would assist the appellants, particularly on the flow of the items sold by the appellants which were said to have been eventually exported by CEE Industries.

C **[43]** It is true that s. 57(2) of the Evidence Act 1950 vests in the court a wide power of judicially informing itself of matters of which it can take judicial notice (see *Lim Kong v. PP* [1962] 1 LNS 89; [1962] MLJ 195). But it is also trite law that matters of which the court may take judicial notice must be the subject of common and general knowledge and accepted by the D public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.

[44] As such, it may be justified for this court to consider taking judicial E notice of the fact that goods exported out of Malaysia must be cleared by Royal Malaysian Customs Department as this could be considered to be common knowledge. Indeed, this can be further supported by the fact that export clearance emanates from the legal authority conferred by a Regulation (such as the Sales Tax (Exemption) Order 2008), of which this court is compelled to take judicial notice under s. 57(1)(a) of Evidence Act 1950.

F **[45]** However for the purpose of this appeal, I do not think that the law permits the concept of judicial notice to be expanded to encompass matters pertaining to the flow of the items which originated from the appellants and assumed to have been somehow exported because that "fact", as it is too specific, would certainly not be a subject of common or general knowledge. G

[46] In their submission, the appellants raised two case law authorities said to be supportive of their appeal. The first is the case of *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541; [1994] 2 MLJ 713, where the Supreme Court held, when H considering whether profits from a disposal of the land in the case was a form of gains from trading which would be assessable to income tax, as follows:

> When there is a conflict of motives why a transaction is entered into, it is the dominant motive of the taxpayer that is important. As the dominant purpose and motive of the taxpayer was not to make a profit but to I provide a roof over the heads of its members, the resulting profit was not derived from trading but was an accretion to capital not liable to income tax.

[47] The appellants thus argued that the intention of the appellants that the goods are sold for the purpose of being exported ought to have been taken into account, with the result that sales tax should rightfully not have been levied. In my view, the facts in this present appeal do not involve conflict of motives or intentions of the kind requiring judicial scrutiny like in *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri.* It is unnecessary to determine if there was such a conflict in this appeal because the provisions of s. 6(a) are clear. A sale of taxable goods manufactured in Malaysia other than to an authorised licensed manufacturer attracts the chargeability of sales tax. In *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri,* the applicable statutory provision is the Income Tax Act 1967, specifically s. 4 of the Act which provides that tax is chargeable on income in respect of among others:

> (a) Gains or profits from a business, for whatever period of time carried on; ...

[48] Thus the statutory provision in contention is much wider in scope. It may potentially admit of various constructions, especially in respect of the word "business" which could justify consideration of motives. On the other hand, by comparison, the words "sold" or "disposed of" embodied in s. 6 of the Sales Tax Act 1972 are in this context fairly straightforward and unequivocal. In any event, even if the appellants' alleged motive for the sales to YLS Metal was for the export of the goods, the totality of evidence before the court would still not assist the appellants in proving their case, principally by reason of the absence of evidential support that the goods sold by the appellants were actually ultimately exported.

[49] The other case referred to by the appellants is *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99. In this case, the key point of relevance is the principle that when there is doubt in the interpretation of statutes, the ambiguity must be construed in favour of the taxpayer as in that case it was ruled that the introduction of a new provision intended to remove the exemption from tax had not been drafted in sufficiently clear words to achieve the purpose. This was especially given that the new provision would have the effect of impairing a pre-existing right.

[50] The appellants thus contended that notwithstanding their failure or oversight in not securing the relevant approvals or exemptions, there are no provisions in the Sales Tax Act 1972 that empower the respondent to charge sales tax for goods which are for exports. Thus, according to the appellants, there must be clear words authorising the respondent to that effect. As I have stated earlier in this judgment, there is really no ambiguity in the legislative framework of the Sales Tax Act 1972 in its treatment of exported goods. Simply stated, I reiterate that sales tax would be chargeable on them unless the requisite approval and exemptions under the Act have first been

obtained. Secondly, as have been explicated earlier in this judgment, it is also not the question of tax being levied on exported goods. Here the issue is, it is plainly not proven that the taxable goods in question were indeed exported.

Other Findings Of The Magistrate

[51] I should add that the decision of the learned Magistrate also dealt with three other issues. Although the appellants' memorandum of appeal and additional memorandum of appeal as well as their written submission do not state the grounds for appealing against the decision of the learned Magistrate on any of these three issues, given that the appeal filed by the Appellants is expressed to be in respect of the entire decision of the learned Magistrate, I have considered, and also agreed with the findings of fact and law made by the learned Magistrate on the three issues, the summary of which is as follows:

(i) *Whether The Claim By The Respondent Against The Appellants Is Valid Under The Law*

I agree with the findings of the learned Magistrate that the claim for unpaid sales tax and accrued penalty filed by the respondent had been made in adherence to s. 30(1)(a) of the Sales Tax Act 1972 read together with s. 22(2) of the same Act. I should add that given my views that the appellants have not been able to demonstrate sufficiently that the relevant goods sold by the appellant to YLS Metal were the same items of goods subsequently exported by CEE Industries, I also find that the claim by the respondent is well within the ambit of s. 6 of the Sales Tax Act 1972, being the principal statutory provision defining chargeability to tax in the said legislation.

(ii) *Whether The Appellants Are Jointly And Severally Liable Under s. 26 Of The Sales Tax Act 1972 To The Claim By The Respondent*

I note that the finding of the learned Magistrate is that both appellants, being partners for the business (under the name of Kim Lee Aluminium & Glass Works) are "bertanggungjawab bersama" (collectively responsible) for the claim for sales tax and penalty by the respondent. However, in my view, it is more accurate to refer to the provision of s. 26 which provides for partners of the firm, including the firm, to be jointly and severally liable for the sales tax and penalty. It is worthy of note that this formulation of liability of partners is not the same as the statutory provision found in s. 11 of the Partnership Act 1961 which makes every partner in a firm to be liable jointly with the other partners for all debt and obligations of the firm. I should emphasise however that s. 26 of the Sales Tax Act 1972 expressly excludes the applicability of any other legislation. As the Partnership Act 1961 is not therefore

relevant, the legal position on the liability of both appellants must be that they are jointly and severally liable to the said claim by the respondent.

(iii) *Whether The Claim By The Respondent Was Made Within Three Years As Stipulated Under The Sales Tax Act 1972*

I agree with the analysis performed and findings made by the learned Magistrate in respect of the calculation of the beginning and expiry of the three year period *vis-à-vis* the claim made by the respondent (*vide* Bil Tuntutan dated 11 April 2011) and found it to be in accordance with the requirements of s. 30(1) (which stipulates that a demand must be made within three years from the date the sales tax or penalty is payable) and s. 22(2) (which provides for the requisite tax to be payable within 28 days from the expiry of the taxable period).

[52] In particular, I agree with the interpretation of the learned Magistrate that the deadline for the respondent to make the claim (considering the end of the 28 day period after the expiry of the earliest taxable period to have been on 29 May 2008) to be on 29 May 2011, which is more than a month after the date on which the claim was actually made on 11 April 2011. Further, the reference to the making of a demand under s. 30(1) is in relation to a demand made by way of a claim as per the demand notice (Bil Tuntutan) and not a suit instituted by the respondent to enforce the claim, since the right to recover any unpaid sales tax or penalty is also recognised expressly by s. 23 of the Sales Tax Act 1972 to be without prejudice to any other remedy.

Justice Of The Case

[53] The counsel for the appellants submitted that justice must be seen to be done in this case. In hearing this appeal, I am ever mindful of the need to ensure that the scales of justice are correctly applied. I recall the case of *Government of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 where it was stated that the courts must balance the need of the Government to realise taxes and the interest of the taxpayer to be protected against arbitrary or incorrect assessments. The courts are ever vigilant against taxpayers who may use procedures like applying for a stay of execution to defer payment or dissipate assets to defeat the judgment. On the other hand, the courts should also bear in mind the possibility of arbitrary assessments by fallible officers who may be driven by the collection targets rather than the accuracy of the assessment.

[54] In this appeal, I observe that in respect of the claim, the respondent had correctly proceeded on the basis of the relevant provisions of the Sales Tax Act 1972 (s. 6, s. 22 and s. 30). The officer primarily responsible for the examinations (SP5) had given a detailed testimony on the same, and her key deliverables, specifically the Laporan Pemeriksaan Akaun and the

accompanying "working sheet" had also been tendered, in addition to the profit and loss accounts, sales invoices and the Internal Tax Returns. A total of 13 officers of the respondent, including no less than the Pengarah Kastam Negeri Johor himself gave evidence for the respondent at the trial of the case. The respondent had certainly not been derelict in affording the appellants the due process and the opportunity to explain their case as well clarifying the position taken by the respondent in instituting the claim (prior to the writ action) including the meeting on 26 January 2011 chaired by Timbalan Pengarah Kastam Negeri and on 24 February 2012 chaired by Pengarah Bahagian Cukai Dalam Negeri. I also note that in the course of the examination by the respondent on the appellants, it was discovered that the latter had manufactured taxable goods which were not specified to be within the scope of their manufacturing license. The appellants then applied on 25 January 2011 for the inclusion of these items in their license, which the respondent swiftly issued on 27 January 2011 (appeal records, pp. 131-134).

[55] On the other hand, the non-declaration of sales tax by the appellants was due to what all witnesses for the appellants (SD1, SD2 and SD3) had said to be their understanding that the sale by the appellants would not be subject to sales tax as the goods were to be exported. This was the position they alleged they had always understood, but unfortunately never clarified with the respondent, even though the sales, technically and in the legal sense, were entered into with YLS Metal locally, and YLS Metal itself did not export the goods. On top of this, this is not a case where the business arrangement with YLS Metal would mean that the goods must necessarily be taxed. As stated earlier, the Act contains exemption mechanisms which were of relevance to the appellants to take advantage of. The taxable goods could actually have been exempted under s. 9(4) of the Sales Tax Act 1972 and the Sales Tax (Exemption) Order 2008. But here, the appellants cited an oversight on their part for not having applied for the same. Therefore, it would be disingenuous an argument, should one be advanced, to suggest that this judgment would be neither fair nor just to the appellants given the difficulty of proving that the goods supplied by the appellants ended up being exported. The appellants did not have to go through the writ action and these proceedings had the requisite exemptions been obtained previously.

[56] The court also agreed with the submission of the respondent that the appellants did not in their defence explained in sufficient detail on the goods that they claimed were for exports. In fact, the appellants never even mentioned YLS Metal and CEE Industries in their pleadings (appeal records, pp. 21 and 22) despite the business arrangement involving these two enterprises being the most critical issue which had been raised in and focused on during the proceedings. It is trite law that a party is bound by his own pleadings. If issues brought up at trial have not been pleaded, the contentions should not be entertained (see *Gimstern Corp (M) Sdn Bhd & Anor v. Global*

Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302, and *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428). Case law authorities establish that courts should not hear counsel for the submission on issues not raised in the pleadings. Thus, as stated earlier, not only are the invoices from YLS Metal to CEE Industries and the Borang K2 issued to the latter inadmissible as they were only marked as "ID", but that the very central issue of the roles performed by YLS Metal and CEE Industries in the flow of the supply of goods, not having been pleaded in the defence of the appellants, should also not have been allowed to be raised and argued. Even if properly pleaded, I would have still found the appellants unsuccessful in proving their case. However, in any event I had decided that in order to ensure that all issues are properly identified and adequately evaluated and analysed in my judgment that these points could still be argued in the submission made by the appellants.

Conclusion

[57] In summary, in view of the foregoing, and for the reasons I have outlined above, I hold that goods for exports fall within the purview of s. 6 of the Sales Tax 1972, and in the absence of any exemptions obtained under the Act, the appellants' contention that their sale of goods to YLS Metal during the material time should not be subject to sales tax must therefore fail. Their argument that the goods were for export is also untenable given a considerable lack of evidential support.

[58] Accordingly, the decision of the learned Magistrate is affirmed and this appeal is dismissed, with costs of RM2,000 to the respondent.